No. 16-AA-244

DISTRICT OF COLUMBIA COURT OF APPEALS

TAMIKA CARPER,

Petitioner,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR REVIEW FROM
THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

BRIEF OF PETITIONER

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are petitioner Tamika Carper, the complainant below, and respondent District of Columbia Housing Authority (DCHA), the respondent below. In the DCHA informal hearing process, Ms. Carper proceeded *pro se*. On appeal, Ms. Carper is represented by Jonathan H. Levy and Beth Mellen Harrison of the Legal Aid Society of the District of Columbia. In the DCHA informal hearing process, DCHA was represented by Mohammad Shouman and Qwendolyn Brown. DCHA is represented in this Court by Chelsea Johnson and Mario Cuahutle. No intervenors or amici have appeared.

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DISTRICT OF COLUMBIA HOUSING AUTHORITY,

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ON PETITION FOR REVIEW FROM
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BRIEF OF PETITIONER

ISSUES PRESENTED

1. Whether the hearing officer committed legal error by terminating Tamika Carper from the Housing Choice Voucher Program based on his incorrect belief that he was required, as a matter of law, to terminate anyone found to have engaged in violent criminal activity?

2. Whether the hearing officer committed legal error by terminating Tamika Carper from the Housing Choice Voucher Program without considering substantial mitigating evidence in the record, making related factual findings, or

explaining his ultimate decision to exercise his discretion to affirm termination based on all of the evidence presented?

STATEMENT OF THE CASE

In August 2015, the District of Columbia Housing Authority (DCHA) recommended termination of Tamika Carper from the Housing Choice Voucher Program for engaging in violent criminal activity. Ms. Carper alleges that during the incident in question, the father of one of her children came over to her home drunk and high and verbally and physically abused her, and that she assaulted him in return – and their teenage son when he intervened. Ms. Carper ultimately received a suspended sentence after pleading guilty to one count of attempted second degree cruelty to children causing grave risk and one count of attempted assault with a dangerous weapon.

Ms. Carper contested her termination and requested an informal hearing. She proceeded *pro se* at the hearing. Her principal argument was that she should not be terminated because of mitigating evidence that she presented, including the circumstances surrounding the incident in question, her history as a survivor of domestic violence, her mental health issues, including addiction, and her rehabilitation and treatment since the incident. The Hearing Officer issued a decision in December 2015 upholding Ms. Carper's termination. The decision, read together with the hearing transcript, demonstrates that the Hearing Officer

believed that because Ms. Carper had pled guilty to two violent criminal offenses, her termination from the Voucher Program was mandatory, and he lacked any discretion to reject termination. The decision thus does not acknowledge or respond to Ms. Carper's presentation of mitigating evidence, viewing such evidence as irrelevant.

Ms. Carper timely appealed this determination to the Executive Director of DCHA, who issued a decision in February 2016 affirming the Hearing Officer's decision and Ms. Carper's termination. This timely petition for review followed.

STATEMENT OF FACTS

A. Statutory & Regulatory Framework.

1. The Housing Choice Voucher Program.

Congress created the Section 8 Housing Choice Voucher Program under the Housing and Community Development Act of 1974. The Voucher Program is one of several rent subsidy programs aiding low-income families known commonly as "Section 8," enacted as Chapter 8 of the United States Housing Act of 1937 and codified at 42 U.S.C. § 1437f. The United States Department of Housing and Urban Development (HUD) has promulgated regulations implementing the Voucher Program at 24 C.F.R. pt. 982.

The purpose of the Voucher Program, like all Section 8 rent subsidy programs, is to "aid[] low-income families in obtaining a decent place to live and [to] promot[e] economically mixed housing." 42 U.S.C. § 1437f(a) (2012). Participants in the Voucher Program receive Section 8 Housing Choice Vouchers from a local public housing agency, which the participants use to rent an existing unit on the private housing market. *See id*. § 1437f(o); 24 C.F.R. § 982.1 (2015). The tenant is required to pay approximately thirty percent of his or her income toward the rent each month, with the local public housing agency paying the remainder directly to the landlord. 42 U.S.C. § 1437f(o). The federal government, through HUD, allocates funds to local public housing agencies throughout the nation to administer the Voucher Program. *Id*. § 1437f(o)(1).

The Housing Act delegates limited authority to local public housing agencies to administer the program pursuant to federal regulations and requirements. *See* 42 U.S.C. § 1437f; 24 C.F.R. §§ 982.1, 982.51, 982.52. A local public housing agency exercises this delegated authority by adopting an administrative plan, which "establishes local policies for administration of the program in accordance with HUD requirements." 24 C.F.R. § 982.54(a).

The D.C. Housing Authority (DCHA) administers the local Voucher Program in the District. *See* D.C. Code § 6-202 (2012). DCHA has codified its

Voucher Program Administrative Plan in local regulations. *See* 14 DCMR chs. 49-59, 61, 74, 76, 83, 85, 89 (2015).

2. Termination Proceedings in the Voucher Program.

Federal regulations list nineteen specific grounds for terminating assistance in the Voucher Program. *See* 24 C.F.R. §§ 982.552, 982.553. Five of these grounds are mandatory; the public housing agency *must* terminate assistance if, for example, a family has been "evicted from housing assisted under the program for serious violation of the lease." *Id.* § 982.552(b)(2); *see also id.* §§ 982.552(b)(3)-(5), 982.553(b)(1)(ii).[1] The remaining fourteen grounds are discretionary; the public housing agency *may* terminate assistance on those grounds. *Id.* §§ 982.552(c)(1)(i)-(xi), 982.553(b)(1)(i), (b)(1)(iii), (b)(2)-(3).[2]

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[1] The mandatory bases for termination are (1) eviction from a federally assisted housing program for a serious lease violation, (2) failure to submit certain consent forms, (3) failure to establish citizenship or eligible immigration status, (4) failure to meet eligibility requirements for individuals enrolled in higher education institutions, and (5) conviction for manufacturing or producing methamphetamine on a federally assisted housing project. 24 C.F.R. §§ 982.552(b)(2)-(5), 982.553(b)(1)(ii).

[2] The discretionary bases for termination are (1) failure to comply with a family obligation; (2) eviction from federally assisted housing in the past five years; (3) prior termination of assistance for any member of the family; (4) fraud, bribery, or other criminal acts committed in connection with a federally assisted housing program; (5) currently owing any amounts to a public housing agency in connection with a federally assisted housing program; (6) failing to reimburse a public housing agency for amounts owed in connection with a federally assisted housing program; (7) failing to comply with a repayment agreement entered with a public housing agency; (8) failing to comply with requirements under the

HUD has provided guidance as to how public housing agencies should exercise this discretion. As to the discretionary grounds for termination, the public housing agency "may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure." *Id.* § 982.552(c)(2)(i).

Among these discretionary grounds, a public housing agency may terminate assistance if any member of the household engages in "violent criminal activity." *Id.* §§ 982.551(*l*), 982.553(b)(2).[3] "Violent criminal activity" is defined as "any criminal activity that has as one of its elements the use, attempted

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Family Self-Sufficiency program, where applicable; (9) having engaged in or threatened abusive or violent behavior toward public housing agency personnel; (10) failing to comply with requirements of the welfare-to-work program, where applicable; (11) current illegal drug use or a pattern of such use that currently interferes with others; (12) engaging in drug-related criminal activity; (13) engaging in violent criminal activity; or (14) a pattern of alcohol abuse that may interfere with others. 24 C.F.R. §§ 982.552(c)(1)(i)-(xi), 982.553(b)(1)-(3). With respect to the first ground – violation of a family obligation – HUD has established thirteen specific family obligations, including refraining from engaging in drug-related or violent criminal activity. *Id.* § 982.551(b)-(n).

[3] Engaging in violent criminal activity is listed twice in the federal regulations, once in the general list of family obligations, 24 C.F.R. § 982.551(*l*), and again in a subsequent regulation covering all grounds for termination of assistance related to criminal activity, *id.* § 982.553(b)(2). The dual regulations are intended to encapsulate one discretionary ground for termination, as the local regulation also makes clear. *See* 14 DCMR § 5804.6(a) (2015).

use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage." *Id.* §§ 5.100, 982.4(a).

A participant facing termination from the Voucher Program on any of these grounds, whether mandatory or discretionary, has the right to request an informal hearing to challenge the termination decision. *Id.* § 982.555(a)(1)(iv). The participant has the right to prior notice explaining the basis for termination, limited discovery, representation by counsel, and the opportunity to present evidence and question witnesses. *Id.* §§ 982.555(c), (e)(2), (3), (5). The officer conducting the hearing may be appointed by the public housing agency but must be a person other than the person who made or approved the challenged decision. *Id.* § 982.555(e)(4). The hearing officer "must issue a written decision, stating briefly the reasons for the decision." *Id.* § 982.555(e)(6). As to the contents of this decision, HUD requires that "[f]actual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing." *Id.*

3. Applicable Local Regulations.

DCHA has incorporated the federal regulations governing termination of assistance in the Voucher Program into its local regulations. Among the allowable discretionary grounds for termination:

> DCHA *may* terminate participation of a Family if . . . [a]ny adult Family member has engaged in any violent criminal activity in the preceding two (2) years from the date of a notice of recommendation for termination for violent criminal activity.

14 DCMR § 5804.6(a) (emphasis added). In cases in which DCHA's termination authority is discretionary, "DCHA *will* consider evidence of or testimony about relevant mitigating circumstances, rehabilitation, and disabilities as enumerated at 24 C.F.R. § 982.552(c)(2)." *Id.* § 5804.8 (emphasis added).

Local regulations guarantee all of the same procedural rights to participants required under federal law. *See id.* §§ 8902.1(j) (informal hearing), 8902.3 (notice), 8903.4 (discovery), 8904.1, 8904.4 (conduct of hearing and right to counsel), 8904.3 (appointment of hearing officer). The hearing officer's proposed decision shall include "[a] brief reasoned decision including an assessment of the factual basis and explanation of the legal reasoning in support of the decision." *Id.* § 8905.2(a). Specifically, the decision must contain "[f]actual determinations relating to the individual circumstances of the participant or applicant based on a preponderance of the evidence and testimony presented at the informal hearing." *Id.* § 8905.1(b).

Either party may appeal an adverse informal hearing decision to the Executive Director of DCHA. *Id.* §§ 8905.3, 8905.4. The final informal hearing decision from the Executive Director constitutes final agency action in a contested case, subject to review by this Court under the District of Columbia

Administrative Procedure Act. *See Mathis v. District of Columbia Hous. Auth.*, 124 A.3d 1089, 1097-1101 (D.C. 2015).

B. Factual Background.

This appeal concerns Respondent District of Columbia Housing Authority (DCHA)'s proposed termination of Petitioner Tamika Carper from participation in the Housing Choice Voucher Program.

Tamika Carper has been a participant in the Voucher Program for approximately ten years. J.A. 72. At the time relevant to this appeal, in 2015, she was using her voucher to rent a unit for herself and her two minor children, ages thirteen and four years old.[4]

On August 11, 2015, Ms. Carper was involved in a violent incident at her unit that started with a visit from John Davis, the father of one her sons. *Id*. at 9-10, 30, 72-73. At the time, Mr. Davis was drunk and high. *Id*. Mr. Davis started arguing with Ms. Carper and then beating her. *Id*. Ms. Carper fought back with a small knife, stabbing Mr. Davis. *Id*. At some point, Ms. Carper's older son came out of his bedroom and saw his parents fighting and the resulting injuries. *Id*. at 27-28, 68. The son then confronted Ms. Carper, got in the middle of his

[4] Following the incident in question, Ms. Carper gave notice to her landlord that she was vacating the unit. J.A. 16, 18. She left voluntarily and has not attempted to use her voucher since that time, given the pending termination proceedings. *Id*.

parents, and began kicking Ms. Carper. *Id*. She again fought back with the same knife and ultimately stabbed her son as well. *Id*.

Police were called to the unit. *Id*. at 76-94. Ms. Carper was arrested and ultimately charged with assault with intent to kill (knife or cutting instrument). *Id*. Fearing that she might serve significant prison time (up to five years), Ms. Carper ultimately entered a plea agreement in which she pled guilty to two lesser offenses (attempted second degree cruelty to children and attempted assault with a dangerous weapon) in exchange for a suspended sentence and probation. *Id*. at 19-20, 30-31. Ms. Carper was sentenced to 180 days suspended, plus three years of supervised release and five years of probation. *Id*. at 20-21, 98-99. Among her probation conditions are drug testing and treatment, mental health screening and evaluation, anger management classes, domestic violence counseling, parenting classes and individual coaching on parenting skills, and supervision by the Mental Health Unit of the Court Services Offender Supervision Agency. *Id*. Ms. Carper has fully complied with the terms of her probation.

On August 20, 2015, DCHA issued a Recommendation for Termination seeking to terminate Ms. Carper's participation in the Housing Choice Voucher Program. *Id*. at 1-3. The Recommendation for Termination alleged that Ms. Carper violated her family obligations by engaging in violent criminal activity,

citing the August 11, 2015 incident. *Id*. Ms. Carper requested an informal hearing to challenge her proposed termination from the Voucher Program.

The informal hearing in Ms. Carper's case was conducted on December 4, 2015 by Hearing Officer Wyndell Banks. *Id*. at 4-64. Ms. Carper's mother, Sheila Carper, attended the hearing with her. *Id*. Both mother and daughter made repeated attempts to tell the Hearing Officer about the circumstances surrounding the August 11, 2015 incident and to plead for DCHA to give Ms. Carper a second chance. Ms. Carper relayed that she is a survivor of domestic violence, having been in abusive relationships with men, including Mr. Davis, for the past eight years. *Id*. at 10. She also disclosed her struggle with drug addiction and mental health issues. *Id*. at 22, 27, 29, 35-36. Sheila Carper repeatedly stated that her daughter was not in her "right state of mind" on the night in question. *Id*. at 21-22, 27, 34, 54.

Tamika and Sheila Carper also talked about Tamika Carper's rehabilitation since the incident. Sheila Carper relayed that her daughter was trying to get herself together, had earned her associate's degree, and was about to start an internship. *Id*. at 16, 29. Both women also noted that Ms. Carper had been in the Voucher Program for ten years without any violations until this incident, and repeatedly asked the Hearing Officer to give Ms. Carper a second chance. *Id*. at 10, 15-16, 32-33, 35-36, 48, 49, 50, 51, 54-55. In sum, as Tamika Carper put it:

> I'm getting the necessary help now that I need. So, as far as mental and substance abuse. But I just feel like I've been with you all for ten plus and never made mistakes, followed the rules and regulations. I just want a second chance, that's it. *Id*. at 35-36.

In response to these arguments, the Hearing Officer indicated at various points that he did not have any discretion to consider Ms. Carper's request for a lesser punishment or the mitigating evidence presented, and that these issues should have been raised in the criminal case:

> Ms. Carper, I appreciate all of that, but those matters should have been brought up at the hearing in regard . . . to these issues . . . All I have before me now is basically a conviction by the court for second degree cruelty to children and attempted assault with a dangerous weapon. So, you haven't presented any evidence that these are not in fact what Ms. Carper was found guilty of. *Id*. at 44.

> The issue here, *the only issue here* is going to be whether or not these two violations or criminal violations that she's been charged with fall under the definition of violent criminal activity. *If they fall under the definition of violent criminal activity, then the recommendation for termination will be affirmed. Id*. at 45.

> The District of Columbia criminal code defines what is a violent criminal activity in the District of Columbia. If what you were found guilty of is defined as a violent criminal activity, then the Housing Authority has the authority to terminate your voucher. *If it is not found as a violent criminal activity, then I have discretion to determine whether or not the Housing Authority can terminate your voucher.* I don't know the answer here, because I, to that question, because I don't have the code here. *Id*. at 46.

> And I'm going to be honest with you, the things that you're bringing up now should have been brought up in this case, but the fact of the matter is, Ms. Carper pled guilty to two crimes. Now, if you didn't want to plead guilty to those crimes, you should have brought those up in a trial at the criminal case. But we have -- the record is what

the record is, it's not a question of whether or not anyone cares or don't care. *Id*. at 52-53.

On December 15, 2015, the Hearing Officer issued an Informal Hearing Decision affirming DCHA's recommendation for termination. *Id*. at 66-71. The Decision's "Findings of Fact" recited much of the evidence presented by Ms. Carper and her mother at the hearing: that she was in an eight-year abusive relationship with Mr. Davis; that Mr. Davis had come over to her unit high and drunk; that Ms. Carper was fighting back when she stabbed both Mr. Davis and her son; that she pled guilty pursuant to a plea agreement in order to avoid the risk of significant jail time; that she had suffered with substance abuse and mental health issues but was now getting the help that she needed; and that she wanted a second chance. *Id*. at 66-69. While this section of the Decision is labeled as "Findings of Fact," it actually is nothing more than a recitation of the evidence presented, with each of the "findings" related to mitigating evidence prefaced with "Complainant [Ms. Carper] stated . . . " *Id*. at 68-69. The decision made no attempt to resolve disputed facts, such as whether Ms. Carper was attacked first, but simply recited evidence on both sides. *Id*. at 66-69.

Despite reciting the substantial mitigating evidence presented by Ms. Carper and her mother, the Hearing Officer's "Conclusions of Law" focused solely on the question of whether the two criminal offenses to which Ms. Carper pled guilty constitute "violent criminal activity." *Id*. at 4-5. After reciting the

federal definition of "violent criminal activity" and a definition under the D.C. Code, the Hearing Officer concluded:

> 7. Based on the evidence submitted, the testimony of the parties, and applicable state and federal law, Complainant engaged in "violent criminal activity" in this case.
>
> 8. Since Complainant engaged in "violent criminal activity" within 2 years of the Recommendation for Termination, DCHA has the authority to terminate Complainant's participation in the HCVP.

Id. at 70. The Hearing Officer then ordered that Ms. Carper's termination be affirmed. *Id*.

Ms. Carper, again acting *pro se*, timely appealed the Hearing Officer's Decision to the Executive Director. *Id*. at 102-104. In her appeal, Ms. Carper pointed to the same mitigating circumstances that she presented at the informal hearing: that she had been in the Voucher Program for 10 years without incident; that she is a survivor of domestic violence, having been in abusive relationships for over 8 years; that she has battled drug addiction; and that through all of this, she earned her associate's degree and was currently pursuing her bachelor's degree. *Id*. Ms. Carper also relayed her side of what happened on the night in question, specifically that she was fighting back after Mr. Davis and then her son attacked her. *Id*.

The Executive Director issued her Final Informal Hearing Decision on February 22, 2016. *Id*. at 105. The relevant portion of the decision reads in full:

> The facts presented at the hearing support the Proposed Decision made by the Hearing Officer. There is no error of law or fact by the Hearing Officer. The proposed decision is hereby AFFIRMED.

Id. This appeal followed.

SUMMARY OF ARGUMENT

DCHA proposes to terminate Tamika Carper's participation in the Housing Choice Voucher Program based on allegations of violent criminal activity, a discretionary ground for termination. Federal and local regulations authorize the hearing officer in such cases to consider all of the circumstances of the case and any mitigating evidence presented by the family in determining whether termination is warranted, and ultimately to exercise discretion to reject termination. In discretionary termination cases where mitigating evidence is presented, a hearing officer must – at a minimum – understand his authority to consider such evidence, make related factual findings, and explain his decision to exercise his discretion to affirm or reject termination based on all of the evidence in the record. This minimum standard is required by the District of Columbia Administrative Procedure Act and the federal and local regulations governing the Housing Choice Voucher Program.

The Hearing Officer in this case committed reversible legal error by failing to meet these standards. At the informal hearing, Ms. Carper presented substantial mitigating evidence for consideration; indeed, her presentation

consisted almost entirely of her plea for mitigation. Yet, the informal hearing decision and the transcript of the hearing itself demonstrate that the Hearing Officer believed he had no choice but to terminate Ms. Carper's voucher once the fact of a violent crime was established. Flowing from this fundamental legal error, the Hearing Officer failed to understand that he had any authority to consider mitigating evidence, failed to make any related findings of fact, and ultimately failed to explain his decision to exercise discretion, one way or the other. The decision thus fails to meet the minimum standards established under District and federal law.

This Court therefore should reverse the decision and remand with instructions for the Hearing Officer to make appropriate findings of fact related to the mitigating evidence presented at the informal hearing, to exercise his discretion to affirm or reverse Ms. Carper's proposed termination from the Voucher Program based on all of the evidence presented, and to issue a decision explaining that exercise of discretion.

STANDARD OF REVIEW

This Court reviews legal conclusions – including the Hearing Officer's conclusion that he lacked authority to decline to terminate anyone found to have committed violent criminal activity – *de novo*. *See*, *e.g.*, *In re Al-Nashiri*, 835 F.3d 110, 118, (D.C. Cir. 2016) (whether a lower court applies the proper legal

standard in exercising its discretion is a question of law reviewed *de novo*) (quoting *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349, 355 U.S. App. D.C. 446 (2003)); *Littman v. Cacho*, 143 A.3d 90, 93 (D.C. 2016) (trial court abused its discretion with respect to custody when it erroneously believed it was required by law to terminate visitation rights); *cf. Aguehounde v. District of Columbia*, 666 A.2d 443, 447 (D.C. 1995) (appellate court conducts a *de novo* review of lower court's determination of whether municipality's action was discretionary).

ARGUMENT

I. THE HEARING OFFICER COMMITTED LEGAL ERROR BY CONCLUDING THAT HE LACKED DISCRETION TO REJECT TERMINATION.

A. The Hearing Officer Had Discretion to Reject Termination.

Federal law divides the allowable grounds for termination from the Housing Choice Voucher Program into two distinct categories. Five grounds for termination are mandatory (as indicated by the use of the words "must" or "shall"). *See, e.g.*, 24 C.F.R. § 982.552(b)(2) ("The PHA *must* terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease.") (emphasis added); 14 DCMR § 5804.4(a) ("DCHA *shall* terminate assistance if [a] Family fails to submit documentation within the required timeframe concerning any Family member's citizenship or

immigration status . . . ") (emphasis added). The remaining fourteen grounds for termination are entirely discretionary (as indicated by the use of the word "may"). *See, e.g.*, 24 C.F.R. § 982.552(c)(1)(i) ("The PHA *may* at any time . . . terminate program assistance for a participant . . . [i]f the family violates any family obligations under the program (see § 982.551).")) (emphasis added); 14 DCMR § 5804.6(a) ("DCHA *may* terminate participation of a Family if [a]ny adult Family member has engaged in any violent criminal activity in the preceding two (2) years from the date of a notice of recommendation for termination for violent criminal activity.") (emphasis added). Here, the sole basis for termination is that Ms. Carper engaged in violent criminal activity, a subset of the larger category of violation of family obligations. *See* 24 C.F.R. § 982.551(*l*). Termination for violating family obligations is unquestionably discretionary under both federal and local regulations. *See id*. § 982.552(c)(1)(i); 14 DCMR § 5804.6(a).

In Ms. Carper's termination case in particular, this exercise of discretion is at the heart of the decision by the Hearing Officer. As the Hearing Officer himself noted, Ms. Carper had pled guilty to crimes involving elements that indisputably constitute "violent criminal activity." Accordingly, Ms. Carper does not contest that DCHA *may* terminate her participation in the Voucher Program under 24 C.F.R. § 982.551 and 982.552 and 14 DCMR § 5804.6(a). However, it is also true that nothing *requires* DCHA to terminate her

participation in the Voucher Program, and that DCHA therefore, by definition, has discretion with respect to her termination. Under these circumstances, it is beyond dispute that the Hearing Officer had discretion to reject Ms. Carper's termination.

Federal regulations point to specific mitigating evidence that may be considered in exercising this discretion:

> In determining whether to deny or terminate assistance because of action or failure to act by members of the family . . . [t]he PHA may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.

24 C.F.R. § 982.552(c)(2)(i).[5] The history behind the regulation on mitigating evidence is instructive. When HUD first added language to the federal regulations authorizing termination based on criminal activity by household members, commenters warned that the new rule was so broad it could amount to a per se bar to admission or requirement for termination. *See* U.S. Dep't. of Hous. & Urban Dev., Section 8 Certificate Program, Moderate Rehabilitation Program

[5] Federal regulations set forth other mitigating evidence that may be considered, including participation in a supervised rehabilitation program for individuals who face termination based on illegal drug use or alcohol abuse and reasonable accommodation for persons with disabilities. 24 C.F.R. § 982.552(c)(2)(iii), (iv). Ms. Carper is not raising claims with respect to these other provisions.

and Housing Voucher Program, 55 Fed. Reg. 28,538 (July 11, 1990). HUD responded by clarifying that public housing agencies retain discretion when making termination decisions:

> The regulation *does not automatically* bar assistance to a family because of past drug-related or violent criminal activity by a family member. *Rather, the PHA has the authority to determine whether denial or termination is appropriate*.

Id. (emphasis added). To emphasize the point, HUD took language from the regulatory preamble and placed it in the regulation itself, creating the provision now found in 24 C.F.R. § 982.552(c)(2)(i). *See id.* HUD amended the regulation in 1995 to make clear that this discretionary authority applies to *all* non-mandatory termination cases (not just those involving criminal activity), again emphasizing the important role of discretion and mitigating evidence:

> The rule defines when the HA *may* deny or terminate assistance because of an action or failure by a member of the family. *However, the HA decides whether and how to exercise this authority and discretion in the circumstances of a particular case.* The final rule specifies that the HA may consider all of the circumstances of the individual case, including seriousness of an offense, the extent of participation or culpability of individual family members, and the effects of program sanctions on family members not involved in a proscribed activity.

See U.S. Dep't. of Hous. & Urban Dev., Section 8 Certificate and Voucher Programs Conforming Rule Part III, 60 Fed. Reg. 34,660, 34,687, 34,715 (July 3, 1995) (emphasis added).

B. The Hearing Officer Erroneously Believed that He Lacked Discretion to Reject Termination.

This Court must reverse an administrative decision that is based on an error of law. *See* D.C. Code § 2-510(a)(3) (review under the D.C. Administrative Procedure Act includes authority "[t]o hold unlawful and set aside any action or findings and conclusions found to be . . . otherwise not in accordance with law"). At the most basic level, the Hearing Officer in this case failed to understand his discretion to reject termination and his resulting authority to consider mitigating evidence. Put another way, the Hearing Officer treated the allegation of violent criminal activity as a mandatory ground for termination from the Voucher Program, when, as a matter of federal and District law, it is a discretionary ground. *See, e.g.*, 24 C.F.R. §§ 982.551(*l*), 982.552(c)(1)(i) (providing that a public housing agency *may* terminate assistance when a participant family violates a family obligation by engaging in violent criminal activity); 14 DCMR § 5804.6(a) (providing that DCHA *may* terminate assistance to a participant family for engaging in violent criminal activity). That legal error alone requires reversal and resolves this case.

When an agency decision maker makes a decision based on an erroneous interpretation of the law – including a decision that otherwise is discretionary – that decision must be reversed. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the

discretion was not guided by erroneous legal conclusions."); *Marino v. DEA*, 401 U.S. App. D.C. 452, 456, 685 F.3d 1076, 1079-80 (2012) (discretionary decision to deny relief under Rule 60(b) reversed because it was "rooted in an error of law") (internal quotation marks omitted)); *United States v. Baskin*, 280 U.S. App. D.C. 366, 886 F.2d 383, 389-90 (1989) (reversing due to district court 's failure to recognize that it had discretion under sentencing guidelines with respect to whether prior convictions rendered defendant a career offender subject to enhanced sentence); *Littman v. Cacho*, 143 A.3d 90, 93 (D.C. 2016) (trial court abused its discretion in terminating third-party visitation rights because court erroneously believed it was required by law to terminate visitation, when it in fact had authority to order visitation); *Henson v. United States*, 122 A.3d 899, 902 (D.C. 2015) ("[W]here a trial court makes an error of law, it infects the exercise of discretion." (citing *Ford v. ChartOne, Inc.*, 908 A.2d 72, 84 (D.C. 2006)); *Negussie v. District of Columbia Dep't of Employment Services*, 915 A.2d 391, 392 (D.C. 2007) (reversing and remanding where administrative law judge failed to recognize discretionary authority to determine worker's compensation claimant's disability percentage rating). The role of this Court in such a case is to articulate the underlying legal standards that must be applied and then to reverse and remand so that the agency can make the decision in the first instance with a proper understanding of the law.

In *Negussie*, a worker's compensation case, the question before the administrative law judge was what percentage of disability to assign for a particular injury. 915 A.2d at 392. The judge stated (incorrectly) that he was bound to select one of the percentages presented by the expert witnesses in the case and lacked discretion to reach a different percentage on his own. *Id*. at 394. The judge "obviously believed he could not exercise his independent judgment in fixing a claimant's disability percentage rating." *Id*. at 398. This constituted reversible legal error, because, as this Court concluded, administrative law judges "have discretion in determining disability percentage ratings and disability awards . . . ." *Id*. The result was a remand to the Compensation Review Board for remand to the administrative law judge "for reconsideration in light of the legal principles articulated in this opinion." *Id*. at 399.

Similarly, in *Littman*, this Court overturned a trial court's denial of third-party custody rights, a decision that is discretionary in the ordinary course, because the trial court had misunderstood the governing law and therefore abused its discretion. *See* 143 A.3d 91, 94. The trial court in *Littman* vacated a prior order providing for third-party visitation rights, based on an erroneous belief that it could not order third-party visitation over the objections of a parent. *See id*. at 91-93. Noting that "a trial court's exercise of discretion premised on incorrect legal principles is an abuse of discretion," this Court determined that the trial

court in fact had authority to order third-party visitation, and thus the trial court's decision denying such visitation amounted to an abuse of discretion that warranted reversal. *See id*. at 93, 94.

The informal hearing decision in this case demonstrates a similarly fundamental misunderstanding by the Hearing Officer of his discretionary authority. The decision does not evidence any understanding by the Hearing Officer that he had discretion to reject termination or to consider mitigating evidence once he made a finding of violent criminal activity. J.A. 66-71. Although Ms. Carper and her mother presented substantial mitigating evidence, the Hearing Officer simply recited this evidence without making any factual findings or acknowledging its relevance to the decision at hand. *Id*. at 68-69. Once the Hearing Officer found that Ms. Carper violated her family obligations by engaging in violent criminal activity and that therefore DCHA had the authority to terminate her, he closed by simply stating that the termination decision therefore was affirmed. *Id*. at 69-70. The decision thus evidences the Hearing Officer's belief that he lacked any discretion to reject termination or consider the mitigating evidence presented.

The record of the informal hearing itself is even clearer with respect to the Hearing Officer's misconception of the law. At multiple points during the hearing, as Ms. Carper and her mother pleaded for a second chance based on

mitigating evidence, the Hearing Officer responded by indicating that he could not consider such evidence. *Id*. at 44, 45, 46, 52-53. When Ms. Carper and her mother attempted to tell the Hearing Officer about the "relevant circumstances" surrounding the incident in question, the "seriousness of the case," and the "culpability of [the] family member[]," 24 C.F.R. § 982.552(c)(2)(i), the Hearing Officer responded that such information should have been presented in Ms. Carper's criminal case. *Id*. The Hearing Officer's view is perhaps best summarized in the following statement:

> The issue here, *the only issue here* is going to be whether or not these two violations or criminal violations that she's been charged with fall under the definition of violent criminal activity. *If they fall under the definition of violent criminal activity, then the recommendation for termination will be affirmed.*

Id. at 45 (emphasis added).[6]

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[6] Indeed, the Hearing Officer's only mention of "discretion" is when he posits what would happen if DCHA could not prove that the crimes Ms. Carper committed amounted to violent criminal activity. J.A. 46. Only in that case did the Hearing Officer believe that he had "discretion to determine whether or not the Housing Authority can terminate your voucher." *Id*. The parties here agree that Ms. Carper did, in fact, engage in violent criminal activity, as established by her convictions pursuant to guilty pleas, and Ms. Carper has not sought to challenge that point. The Hearing Officer was obviously wrong that, had it been otherwise – that is, had DCHA *not* proven violent criminal activity – he would have had discretion to terminate. Had that been the case, the only basis for termination would have been refuted. The Hearing Officer's statement to the contrary simply highlights his confusion.

These statements are clearly erroneous legal conclusions, requiring reversal and remand. The entire point of establishing *discretionary* bases for termination from the Voucher Program is that in some cases, even where a basis for termination is clear, the relevant decision maker can exercise discretion to decline to terminate. The Hearing Officer's statements to the contrary reflect a clear error of law; the decision to terminate was discretionary, not mandatory, and the Hearing Officer had discretion to decline to terminate. Indeed, he could have exercised that discretion in the absence of any mitigating evidence and certainly could have exercised that discretion based on the extensive mitigating evidence presented by Ms. Carper. This mistake of law, by itself, requires reversal so that the Hearing Officer, understanding properly the discretion he possesses, can appropriately exercise that discretion. *See Littman*, 143 A.3d at 93; *Negussie*, 915 A.2d at 392.

II. THE HEARING OFFICER COMMITTED LEGAL ERROR BY FAILING TO EXPLAIN HIS EXERCISE OF DISCRETION OR HIS CONSIDERATION OF MITIGATING EVIDENCE.

The Hearing Officer's erroneous belief that, upon finding violent criminal activity, he was required to terminate Ms. Carper from the Voucher Program regardless of any other facts or circumstances, was reversible error by itself. That erroneous belief led the Hearing Officer to commit several additional errors. First, because of the Hearing Officer's misunderstanding of the law in this regard,

he failed to consider any of the mitigating evidence presented, or, indeed, any evidence that did not relate to the alleged violent criminal activity. Although the Hearing Officer summarized Ms. Carper's (and her mother's) testimony regarding a variety of mitigating circumstances, he did not consider that evidence and made no actual findings with respect to that testimony, because he erroneously considered all such evidence to be irrelevant as a matter of law. Second, and relatedly, because he erroneously believed that he lacked discretion, the Hearing Officer provided no explanation for his decision, other than the facially incomplete explanation that Ms. Carper met one of the bases for *discretionary* termination. For these additional reasons, the Hearing Officer's decision must be reversed and remanded.

A. The Hearing Officer Erred in Failing to Consider the Mitigating Evidence Presented by Ms. Carper.

As detailed above, the decision whether to terminate Ms. Carper's participation in the Voucher Program based on alleged violent criminal activity was discretionary, not mandatory. Federal and District regulations provide further requirements for the exercise of that discretion by directing the decision maker to consider "all relevant circumstances," including specifically "the seriousness of the case, the extent of participation or culpability of individual family members, [and] mitigating circumstances related to the disability of a family member." 24 C.F.R. § 982.552(c)(2)(i); *see* 14 DCMR § 5804.8

(referencing 24 C.F.R. § 982.552(c)(2) and specifically stating that "DCHA *will* consider evidence of or testimony about relevant mitigating circumstances, rehabilitation, and disabilities") (emphasis added). Consideration of such evidence generally requires "[f]actual determinations," which must be "based on a preponderance of the evidence presented at the hearing." 24 C.F.R. § 982.555(e)(6).

There has never been any suggestion in this case that the extensive evidence presented by Ms. Carper and her mother was not relevant and did not include "mitigating circumstances" (*e.g.*, her status as a domestic violence survivor and the fact that she was attacked first and that this was her first alleged misconduct in ten years with the Voucher Program), "rehabilitation" (*e.g.*, that she was fully compliant with all terms of her probation and had obtained an associate's degree), and "disabilities" (*e.g.*, her drug addiction and mental health issues). It is similarly uncontested that the Hearing Officer did not "consider" that evidence. Instead, the Hearing Officer recited the evidence without any consideration or evaluation of it, or indeed any related factual findings (by preponderance of the evidence or otherwise), and then specifically stated that he would not consider it because he (erroneously) viewed it as legally irrelevant based on his belief that he lacked discretion to decline to terminate anyone found to have engaged in violent criminal activity. Accordingly, the Hearing Officer

violated 24 C.F.R. § 982.552(c)(2)(i) and14 DCMR § 5804.8, and his decision must be reversed and remanded for compliance with the regulations.

B. The Hearing Officer Erred in Failing to Explain His Exercise of Discretion or His Consideration of Mitigating Evidence.

1. The Hearing Officer Failed to Provide Sufficient Factual Findings and Legal Conclusions to Allow for Meaningful Appellate Review.

Independent of the specific regulatory requirements that the Hearing Officer here consider and make factual findings regarding mitigating evidence, the Hearing Officer's decision does not meet the basic requirements for any discretionary decision. All administrative decisions, whether mandatory or discretionary, must contain sufficient findings of fact and conclusions of law to allow for meaningful appellate review under the District of Columbia Administrative Procedure Act (DCAPA). *See, e.g.*, *Kennedy v. District of Columbia*, 654 A.2d 847, 858 (D.C. 1994) ("By omitting the necessary nexus between the testimony at the hearing and the [legal] conclusion . . . , the hearing examiner has deprived this court of a basis from which to decide error."); *2101 Wis. Assocs. v. District of Columbia Dep't of Employment Servs.*, 586 A.2d 1221, 1224 (D.C. 1991) ("For this court to perform meaningful review of an agency decision, the administrative findings must resolve basic issues of fact raised by the evidence adduced at the hearing.") (internal quotation marks omitted); *Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, 402

A.2d 36, 42 (D.C. 1979) ("[A]n agency must make findings of fact of a basic or underlying nature necessary to a determination of the ultimate facts, *i.e.*, conclusions of law usually stated in terms of the statutory criteria.") (internal quotation marks and alteration omitted).

For agency decisions involving the exercise of discretion, the decision must include sufficient findings to allow this Court to review the resulting decision for abuse of discretion. *See, e.g.*, *Interstate Commerce Comm'n v. Locomotive Eng'rs*, 482 U.S. 270, 290-91 (1987) (Stevens, J., concurring) ("One of the basic tenets of judicial review of agency decisions is that an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself.") (internal quotation marks omitted); *Coburn v. McHugh*, 400 U.S. App. D.C. 443, 453, 679 F.3d 924, 934 (2012) (remanding to agency for further proceedings, explaining that while "[a]n agency's decision need not be a model of analytic precision to survive a challenge," the court "may not supply a reasoned basis for the agency's action that the agency itself has not given") (internal quotation marks omitted); *Sullivan Indus. v. NLRB*, 294 U.S. App. D.C. 141, 957 F.2d 890, 905 n.12 (1992) (vacating in part and remanding to administrative agency for further explanation of remedy ordered, explaining that until the remedy is explained, "we have no way of reviewing the [decision] for consistency or rationality and no way of keeping our own precedents in

harmony”); *Frausto v. U.S. Dept. of Commerce*, 926 A.2d 151, 157 (D.C. 2007) (holding that Office of Administrative Hearings abused its discretion in failing to explain its denial of a motion to vacate its opinion). *Cf. In re Moreta v. Cestero*, 926 N.Y.S.2d 258, 266-67 (N.Y. Sup. Ct. 2011) (holding that voucher termination decision amounted to an abuse of discretion based on mitigating evidence and circumstances).[7]

The federal and local regulations governing termination of assistance in the Housing Choice Voucher Program contain similar, specific requirements: A participant is entitled to receive “[a] brief reasoned decision including an assessment of the factual basis and explanation of the legal reasoning in support of the decision.” 14 DCMR § 8905.2(a); *see also* 24 C.F.R. § 982.555(e)(6) (requiring a written decision briefly stating the reasons for the decision, noting that factual determinations relating to the individual circumstances of the family must be based upon evidence at the hearing). In adopting the requirement for a written decision in 1984, HUD explained that while the decision does not have to be “legalistic” it should be “truly informative”:

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[7] Courts similarly require a sufficient and reasoned explanation when reviewing administrative rulemaking for abuse of discretion. *See, e.g.*, *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983); *Bluewater Network v. EPA*, 361 U.S., App. 370, 390, 370 F.3d 1, 21 (2004); *Wiley v. Bowen*, 263 U.S. App. D.C. 140, 824 F.2d 1120, 1123 (1987).

> The statement of decision required by the regulation must be truly informative as to the reasons for the decision. This would include a short statement of the elements of fact or law on which the decision is actually based. A bare and conclusory statement of the hearing decision, that does not let the participant know the basic reasons for the decision, will not satisfy the regulatory requirement.

U.S. Dep't. of Hous. & Urban Dev., Section 8 Housing Assistance Payments Program; Existing Housing, 49 Fed. Reg. 12,215, 12,230 (Mar. 29, 1984).

Courts have enforced these requirements to reverse termination decisions that lack sufficient findings. In *Edgecomb v. Housing Authority of Vernon*, 824 F. Supp. 312 (D. Conn. 1993), the court rejected a decision terminating assistance in the Voucher Program where the hearing officer simply stated "there was a preponderance of evidence that indicated that a Family member did engage in such drug related activity while on the Section 8 Program . . ." *Id.* at 316. As the court explained, "[t]he opinion did not state the elements of fact or law on which the decision to uphold the termination of assistance was based. Nor did the hearing officer specify the reasons for her determination or indicate the evidence on which it rested. This decision was contrary to HUD regulations and requirements." *Id.* (citations omitted).[8]

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[8] In the case of a decision terminating participation in a housing subsidy program, these elements are not merely required as a matter of administrative law, they are constitutionally mandated because of the protected property interest in the housing voucher. *See, e.g.*, *Powell v. District of Columbia Hous. Auth.*, 818 A.2d 188, 194-96 (D.C. 2003); *Aikens v. District of Columbia Dep't of Hous. & Cmty. Dev.*, 515 A.2d 712, 718 (D.C. 1986).

Like the decision in *Edgecomb*, the decision in this case fails to provide even the most basic factual findings and legal conclusions to allow for meaningful appellate review. The decision does not include the controlling law, demonstrating no understanding of the Hearing Officer's general obligation to exercise discretion and specific obligation to consider mitigating evidence. J.A. at 69-70. The decision does not include sufficient factual findings, entirely ignoring the substantial mitigating evidence presented or its relevance. *Id*. at 66-69. And the decision does not include any reasons for the ultimate determination, failing to explain what role, if any, discretion or mitigating evidence played in reaching the ultimate termination decision. *Id*. at 69-70. Such a decision "deprive[s] this court of a basis from which to decide error" and must be reversed and remanded. *Kennedy*, 654 A.2d at 858.

2. <u>The Hearing Officer Failed to Explain the Role of Mitigating Evidence in the Ultimate Decision Reached.</u>

Based on the requirements of the DCAPA and federal and local regulations governing the Voucher Program, a hearing officer weighing a discretionary recommendation for termination and presented with substantial mitigating evidence (as in this case) cannot simply remain silent. The hearing officer is required not only to consider such evidence (*i.e.*, make factual findings) but also to offer some explanation – reviewable by this Court for legal error and abuse of discretion – as to how this evidence connects to the ultimate discretionary

decision to affirm or reject termination. This requirement, like the requirement to exercise discretionary authority more generally, breaks down into several components: the hearing officer must 1) understand his authority and obligation to consider such evidence, 2) in fact give it consideration, and 3) explain how the evidence relates to the ultimate decision reached.

The Supreme Judicial Court of Massachusetts has reached this conclusion in its review of discretionary termination decisions under the Voucher Program. In *Carter v. Lynn Housing Authority*, 880 N.E.2d 778, 781-82 (Mass. 2008), the Court reviewed a public housing agency decision terminating a participant from the Housing Choice Voucher Program based on her landlord's allegations of tenant-caused damages in the unit, a discretionary ground for termination. The hearing officer's decision summarily cited the applicable regulations authorizing termination, noted that the landlord had obtained a court judgment against the tenant for $1,440 for "waste," and concluded by affirming the termination. *See id*. at 781. The decision did not include any indication that the hearing officer considered "all relevant circumstances" as contemplated in 24 C.F.R. § 982.552(c)(2)(i), despite the fact that mitigating evidence existed. *See id*. at 782-83.[9] The Court concluded that the decision was fatally defective under governing

[9] The trial court judge pointed to significant mitigating evidence in the record, including the participant's good standing with the landlord in all other respects, her participation in the Voucher Program for 10 years without incident,

federal regulations, because "there [was] no indication in the hearing officer's brief written decision that he recognized that he had the discretionary authority to consider any of those relevant circumstances under 24 C.F.R. § 982.552(c)(2)(i)." *Id*. at 785. The Court concluded:

> Reading 24 C.F.R. § 982.555(e)(6), and § 982.552(c)(2)(i), together, it is clear that, in a case such as this, the decision of a hearing officer must, at a minimum, reflect factual determinations relating to the individual circumstances of the family (based on a preponderance of the evidence at the hearing), demonstrate that he is aware of his discretionary authority under 24 C.F.R. § 982.552(c)(2)(i), to take all relevant circumstances (including mitigat[ing] circumstances) into account, and indicate whether he either did or did not choose to exercise that discretion in favor of mitigating the penalty (here termination of Section 8 benefits) in a particular case.

Id. at 785-86 (internal citation omitted).[10]

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her extreme poverty and the impact of losing the voucher, and her disability. *See Carter*, 880 N.E.2d at 782-83.

[10] *See also Costa v. Fall River Hous. Auth.*, 903 N.E.2d 1098, 1113 (Mass. 2009) (rejecting hearing officer decision, *inter alia*, for failing to meet this standard) ("We are not able to ascertain from its decision whether the grievance panel was aware of its discretion in these areas."); *Fuentes v. Revere Hous. Auth.*, *5 (Mass. App. Ct. 2013) ("Critically, the decision also gives no indication that the hearing officer was aware of his discretionary authority to consider such relevant and potentially mitigating factors as the plaintiff's account of domestic violence, her inability to work due to her recent injury, or the impact that terminating Section 8 benefits would have on her six minor children."); *Wojcik v. Lynn Hous. Auth.*, 845 N.E.2d. 1160, 1167-68 (Mass. App. Ct. 2006) (holding that discretionary termination decision must involve process in which participant can present mitigating circumstances and, at least where the agency has not offered that opportunity prior to the informal hearing, the hearing officer must be able to consider mitigating evidence) (cited in *Carter*, 880 N.E.2d at 785).

Other state and federal courts around the country have split with respect to the need for an explicit explanation of the exercise of discretion and consideration of mitigating evidence. Some courts have rejected hearing officer decisions on this basis, finding that decisions that do not explain a refusal to consider mitigating evidence or exercise discretion to terminate (or not) violate the federal regulations and basic requirements of state administrative procedure law. *See, e.g.*, *Lipscomb v. Hous. Auth.*, 45 N.E.3d 1138, 1148-49 (Ill. App. Ct. 2015) (reversing and remanding where hearing officer decision stated no mitigating evidence had been presented but such evidence was in the record); *Gaston v. CHAC, Inc.*, 872 N.E.2d 38, 44-45 (Ill. 2007) (reversing voucher terminations because hearing officer decisions did not reflect any consideration of relevant mitigating evidence presented or explain why hearing officer exercised discretion to terminate). Other courts have distinguished or disagreed with these decisions. *See Robinson v. District of Columbia Hous. Auth.*, 660 F. Supp. 2d 6, 16-17 (D.D.C. 2009) ("Given the language and plain meaning of the words used 24 C.F.R. § 982.552(c)(2)(i), the Court must defer to the agency's interpretation of the regulation and therefore, the Hearing Officer was under no obligation to explicitly consider the mitigating circumstances presented at the informal hearing by the plaintiff."); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790, 801 (Iowa 2011) ("We agree with the *Robinson* court that §

982.552(c)(2)(i) does not require the hearing officer to state specifically whether he or she considered the mitigating factors brought forth by the tenant, *at least where circumstances indicate the hearing officer was aware of his or her discretion to consider those factors*.") (emphasis added); *Peterson v. Wash. Cty. Hous. & Redev. Auth.*, 805 N.W.2d 558, 564 (Minn. Ct. App. 2011) ("We hold that a hearing officer is not required to consider mitigating factors, like the hardship issues that Peterson alleges, when deciding whether a [participant]'s violation of a reporting rule is a terminable offense.").

There are good reasons to reject each of these decisions as persuasive authority. In *Robinson*, the court relied primarily on deference to an agency's interpretation of its own regulations. *See* 660 F. Supp. 2d at 16-17. But this rationale is simply misplaced where the court was relying on a District agency (DCHA)'s interpretation of a federal agency (HUD)'s regulations. Moreover, *Robinson* was decided four years before DCHA adopted its current termination regulations in 2013, which *require* consideration of mitigating evidence. *See* D.C. Hous. Auth., Final Rulemaking, 60 D.C. Reg. 13,167, 13,169 (Sept. 20, 2013). The *Bowman* court limited its holding to situations where the hearing officer *is* aware of his discretionary authority, and also conceded that "a better practice might have been for the hearing officer to state expressly in his decision that he had received her mitigating evidence and to describe the extent to which

he considered it." 805 N.W.2d at 801. And the *Peterson* decision concluded that a hearing officer may treat a discretionary termination ground as mandatory, a flawed premise that conflicts with federal regulations establishing certain termination grounds as discretionary. *See* 805 N.W.2d at 564.

Robinson, *Bowman*, and *Peterson* primarily point to the fact that 24 C.F.R. § 982.552(c)(2)(i) says the hearing office *may* – but not *must* – consider mitigating evidence. *See Robinson*, 660 F. Supp. 2d. at 17; *Bowman*, 805 N.W.2d at 799; *Peterson*, 805 N.W.2d at 564. The courts conclude that an informal hearing decision ignoring such evidence is consistent with the federal regulatory scheme. *See Robinson*, 660 F. Supp. 2d. at 17; *Bowman*, 805 N.W.2d at 799; *Peterson*, 805 N.W.2d at 564. In the District, where local regulations *require* consideration of mitigating evidence, this argument carries no weight. But even putting that aside, this approach is problematic because it allows a decision maker to issue a decision that is entirely unreviewable on the question of discretion. As the *Carter* court explained:

> That assertion misses the mark. It presupposes the predicate issue that forms the crux of this dispute: whether the hearing officer recognized that he had discretionary authority to consider relevant circumstances.

Carter, 880 N.E.2d at 785. Unless a hearing officer makes at least some findings with respect to his discretionary authority, it is impossible to know if a decision's

silence reflects an exercise of discretion itself or ignorance (and legal error) about the availability of such discretion.

In the context of termination from the Voucher Program on a discretionary basis, a hearing officer decision that fails to explain the exercise of discretion inherent in such a decision also blurs any meaningful distinction between mandatory and discretionary termination grounds. *See Gaston*, 872 N.E.2d at 45. This approach is directly inconsistent with the federal termination regulations, in which HUD has set forth both mandatory and discretionary grounds for termination and emphasized that public housing agencies need not exercise their authority in every discretionary case. *See* 24 C.F.R. §§ 982.552, 982.553; Section 8 Certificate and Voucher Programs Conforming Rule Part III, *supra*, 60 Fed. Reg. at 34,687, 34,715; Section 8 Certificate Program, Moderate Rehabilitation Program and Housing Voucher Program, *supra*, 55 Fed. Reg. 28,538.

For all of these reasons, the better view is the standard adopted by the Supreme Judicial Court in *Carter*: where mitigating evidence has been presented, a discretionary termination decision under the Voucher Program must reflect the hearing officer's understanding of his authority to consider mitigating evidence, include findings related to such evidence, and ultimately explain the hearing officer's exercise of his discretionary authority. *See* 880 N.E.2d at 785. In this case, the Hearing Officer's failure to consider the ample mitigating evidence here

or explain the reasons for terminating Ms. Carper's voucher despite this evidence is reversible error. Even if the Hearing Officer had properly understood that he had discretion (which he did not), these additional failures would require reversal. Considering the evidence of mitigating circumstances, making findings regarding that evidence, and then explaining how those findings were addressed in exercising discretion, are all required by applicable law and necessary to ensure fairness and to allow this Court to conduct its review for abuse of discretion.

CONCLUSION

For the foregoing reasons, the Final Informal Hearing Decision of the District of Columbia Housing Authority Executive Director affirming Petitioner Tamika Carper's termination from the Housing Choice Voucher Program should be reversed and remanded.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be served with the District of Columbia Court of Appeals electronically and delivered by first-class mail, postage prepaid (and courtesy copy by electronic mail), this 23rd day of December 2016, to:

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